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Re: Response to questions posed by the ALRB in regard to issues in Gallo Vineyards, Inc., Cases Nos. 03-CE-9-SAL, 03-CE-9-1-SAL

The Board's initial question asks:

> **What are existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?**

Existing Standards

Since only an employee, a group of employees, or their representative can file a petition for decertification, it is well settled that an employer cannot file such a petition, nor plant the idea of decertification, nor start the decertification effort, nor lend more than minimal approval and support of the petition. Accordingly, the showing of interest solicited by supervisors is generally invalid for establishing interest. (*M. Caratan* (1984) 9 ALRB No. 33 (temporary supervisor cannot act on behalf of employer in promoting decertification); *Peter Solomon & Joseph Soloman, dba Cattle Valley Farms et al.* (1984) 9 ALRB No. 65 (employer unlawfully instigated and assisted employees in filing desertification petition by assembling discontented employees and referring them to free legal representation, prearranged by employer, to assist them in decertifying their bargaining agent); *Nick J. Canata* (1984) 9 ALRB No. 8 (unlawful for a decertification petition to be filed by an employer, a supervisor, or employee acting as agent of employer); *Abatti Farms, Inc. and Abatti Produce, Inc.* (1979) 5 ALRB No. 34 (showing that employer instigated decertification effort will warrant setting aside election).

That having been said, the real answer to the query about existing standards turns on whether the issue arises in the context of an unfair labor practice or as an objection to a representation election, for in either situation the labor boards adhere to standards which are similar if not identical.

Allegations of employer interference or assistance in conjunction with a decertification petition, in violation of section 8(a)(1) of the NLRA (or national act) or, correspondingly, section 1153(a) of the ALRA (or Act) will be examined by the NLRB (or national board) only in the context of an unfair labor practice proceeding. Such cases turn on whether it can be shown that there was a causal relationship between the unfair labor practices and employee disaffection with their bargaining representative. (*D&D Enters, Inc.* (2001) 336 NLRB No. 76; *Williams Enterprises* (1993) 312 NLRB 937 *enforced* (50 F2d 1280) [1]

But when ruling on an objection to a decertification election based on an employer's alleged assistance, the question will be examined as a purely investigatory rather than an adversarial matter in which the complaining party bears a heavy burden of proof. Deciding the issue in that context, both labor boards do so according to an objective standard which seeks to determine whether the assistance was such that it would tend to interfere with employee free choice and affect the results of the election. Of course such an outcome determinative test depends on access to a final tally of ballots. (See ALRA section 1156.3(c) mandating that the Board shall certify the results of elections unless it finds conduct affecting the election or conduct affecting the results of the election, concepts the ALRB has held will be read in the disjunctive).

A different analysis attaches to identical issues depending upon whether they are asserted as election objections or unfair labor practices. For example, on the basis of an appropriate election objection, the Board could determine that employees who were the direct object of supervisory solicitations were likely to have disseminated that information among other employees, thereby interfering with their free choice and affecting the outcome of the election. A different result obtains where the same question is the subject of an unfair labor practice, in which case the NLRB's relatively recent ruling in *Springs Industries* (2000) 332 NLRB No. 10 is particularly instructive. Affirming a trial judge's finding that three different supervisors made separate statements involving threats of job loss or plant closure unless employees voted to oust the union, the national board set aside the election only because of the severity of multiple threats, explaining that the case "involves a threat of plant closure, arguably the most serious of all the 'hallmark' violations of...the Act" and because the record disclosed ***actual dissemination*** of this threat to an unspecified number of other employees. The NLRB emphasized that its "traditional practice is to presume dissemination of at least the most

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[1] Borrowing from *Master Slack Corp.* (1984) 271 NLRB 78, the NLRB examines four factors: (1) the length of time between the unfair labor practice and the filing of the decertification petition; (2) the nature of the unfair labor practices including whether they are such that they likely would have a lingering or residual impact on employees; (3) whether they are the type of practices that would lead employees to become dissatisfied with their representative; and (4) the effect of the practices on employees in terms of their state of mind in deciding whether to continue to support or to reject their representative. See discussion in relation to *Overnite Transportation, infra.*

serious threats, absent evidence to the contrary." Accordingly, the NLRB established a rebuttable presumption for even the most egregious employer conduct such as, in the *Springs* case, threatening employees with loss of employment as retaliation for their support of the union. (See also *Waste Management, Inc.* (2000) 330 NLRB 634; *Bon Apetit Management Co.* (2001) 334 NLRB No. 130.)

In light of *Springs*, *su*pra, the Board should remain mindful of the fact that the question of employer assistance presently before it is neither the subject of an election objection nor a consolidated objection/unfair labor practice proceeding as it arises solely in the context of an unfair labor practice within the meaning of Chapter 6 of the Act.[2] The question as to whether a decertification petition is "tainted" is limited to the sufficiency of the showing of interest independent of supervisory or employer assistance in obtaining or circulating the petition. Accordingly, the pivotal issue before the Board at the present time is only the adequacy or validity of the showing of interest in the context of an unfair labor practice.

Nature & Level of Assistance Warranting Dismissal of Petition

This aspect of the question reads like a page out of *Ernst Home Centers, Inc.* (1992) 308 NLRB 848, an employer-assisted decertification case affirming and applying the "essential inquiry" standard to determine whether any given act of arguable company assistance in the preparation or circulation of a decertification petition amounts to unlawful assistance or instead falls within the permissible realm of lawful "ministerial" assistance.

Generally speaking, an employer violates NLRA section 8(a)(1), correspondingly, ALRA section 1153(a), by initiating or fostering a decertification petition or by lending more than minimal support and approval to the petition. (*Eastern States Optical Co.* (1985) 275 NLRB 371.) "Other than to provide general information on the [decertification] process on the employees' unsolicited inquiry, an employer has no legitimate role in that activity, either to instigate or to facilitate it. (*Armored Transport, Inc. (2003) 339* NLRB No. 50.)

Research suggests that the NLRB continues to struggle with this question and, as one commentator has suggested, its failure or refusal to issue clear rules in this regard means that,

> The Board's decisions as a group are so unclear and contradictory that the Board often disagrees with the findings of its own ALJs as to whether particular forms of employer assistance to employees seeking decertification constitute unfair labor practices. (Meeker, 66 U.Chi. L. Rev. 999)

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[2] The structure of the Act delineates the interaction between Chapter 5 (representation) and Chapter 6 (unfair labor practices). Where there is a similarity of facts and issues in election objection cases and unfair labor practice proceedings, the two cases may be consolidated for purposes of hearing and decision while at the same time preserving the different standards under which objections and unfair practices are judged. Here, however, there was no consolidation and therefore the only question is that of an appropriate remedy for an unfair labor practice found by an ALJ and pending final ruling by the Board.

Further, according to the same commentator, the NLRB most often applies a "more than ministerial aid" standard to decide whether an employer's assistance to an employee decertification effort is harmless or constitutes an unfair labor practice sufficient to derail decertification. However, she continues,

> Unfortunately for both employers and reviewing courts, 'more than ministerial aid' is a malleable standard that eludes precise definition even when the Board applies it. To make matters more confusing, the Board uses different tests to determine when the standard has been met. It has at times phrased this standard in terms of whether 'but for' the company's assistance the decertification would have occurred, whether the employer 'substantially contributed' to the decertification effort, and whether the employer provided 'more than minimal support and approval' - sometimes all in a single case.
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> These different interpretations of the 'more than ministerial aid' standard may reflect the fact that the Board's aims can vary. The Board sometimes seems to be primarily concerned with how the employer's actions affected employees in the decertification process. At other times the Board is apparently concerned with punishing employer misconduct, even if that conduct was ineffectual. (Id)[3]

In most cases under the national act, a finding that employer assistance tainted the showing of interest in support of the decertification petition merely postpones the processing of the petition, perhaps holding it in abeyance until the charges are resolved or the unlawful conduct is remedied or the effects thereof sufficiently dissipated so as to allow employees to finally exercise an uncoerced choice. At that point, the petitioner may request reinstatement of the petition. Were the ALRB to follow such a practice, it would encounter several impediments as a result of the very nature of agricultural employment which is marked by seasonality and turnover. The ALRA requires that elections be held within seven days of the filing of the petition, that the election be held only when the employer's work force is at no less than 50 percent of its peak agricultural employment for the current calendar year, that the eligibility list is comprised of all employees who were employed in the payroll period immediately preceding the filing of the petition.[4] The Board must also be cognizant of a remedial tool available to the NLRB but not the ALRB, that of setting aside and "rerunning" an election when employer

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[3] The commentator also suggested that since a disgruntled union member will not likely be seeking advice from the incumbent union about how to remove it, employees are apt to direct such inquiries to their employers.

[4] Eligibility under the national act requires the employee to be employed on the date the petition is filed and again on the date the election is held, a requirement more readily attainable in the more stable industrial labor setting.

actions are deemed to have tainted the showing of interest or the results of an election. The Board need only review its own precedents to learn why a "rerun" election, even if immediately following the initial election, is so problematical and why the ALRB, unlike the NLRB, does not have the luxury of merely delaying or rerunning an election with impunity. (See, e.g., *Jack T. Baille* (1979) 5 ALRB No. 72; *Gerawan Ranches* (1990) 16 ALRB No. 8.)

Against the considerations which the ALRB confronts in elections cases must be weighed the public policy of affording agricultural employees a voice in effectuating their Labor Code section 1152 rights. Accordingly, the common thread running through ALRB election decisions is the recognition that the ALRB must seek to certify the results of elections in order to give meaning to employees' rights to "bargain collectively through representatives of their own choosing" or to refrain from such activity. (Labor Code section 1152.) The premise that supports this truism is equally applicable to initial certification and decertification elections and finds support in Labor Code section 1156.3(c) which stands for the proposition that "[u]nless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election." By this language, the Legislature has expressed a clear preference for a representation scheme which is predicated upon affirming elections. Accordingly, the ALRB has consistently followed a policy of upholding elections unless to do so would clearly violate employee rights or result in unreasonable interpretation or application of the Act. (*Ruline Nursery Co. V. Agricultural Labor Relations Board* (1985) 169 Cal.App.3d 247.) The most telling indication of the ALRB's early grasp of this Legislative principle is reflected in its rejection of the NLRB's "laboratory standards," a position born out of practical necessity because it represents an accommodation for the realities of agricultural labor. (*D'Arrigo Brothers of California* (1977) 3 ALRB No. 34.)

Perhaps more significantly, however, the Board questions whether any level of assistance should serve to invalidate a decertification petition. On that score, and in light of the discussion immediately above, the Board would be well advised to exercise extreme care in order to protect employees' statutory right to refrain from union activities, to not be represented by a labor organization, to oust an incumbent representative, or to change representatives. (Labor Code section 1152). Thus, were the Board to rule that any assistance is grounds to dismiss a petition, it will have adopted a per se rule which effectively eradicates fundamental employee rights.

The law is clear that the decision regarding decertification and responsibility to prepare and file a decertification petition belongs solely to the employees. (*Harding Glass Co.* (1995) 316 NLRB 985 and cases cited therein). Accordingly, whatever test this Board may choose to follow in examining employer assistance, it could wisely decide at the outset whether a particular decertification effort was initially a product of employee decision making in a setting free of other unfair labor practices and then seek to ascertain whether the alleged employer assistance was effectual in perfecting the showing of interest. (*Royal Himmel Distilling Co.*(1973) 203 NLRB 370.) From the state of the record as it presently stands, the Board of course is precluded from assessing the potential numerical impact of the supervisory assistance which is in issue in GVI. The method by

which the Board decides this matter should reflect a process which is based on all the circumstances, on its own precedents which reflect the realities of the agricultural work place, and which, in the final analysis, is both logical and rational.

No discussion of alleged employer assistance in the solicitation of support for a decertification petition is complete without reference to the collateral proceeding adopted by both labor boards for the preelection investigation of challenges to the showing of interest on a variety of grounds. The purpose of course is to avoid proceeding on the basis of frivolous petitions and wasting agency resources in conducting elections where the demonstrated employee interest either is insufficient or invalid. (Title 8, California Code of Regulations sec. 20300(j)(4); *Northeastern University* (1975) 218 NLRB 247.)

As a general rule, the showing of interest requirement is a purely administrative tool designed for the sole purpose of enabling the labor boards to determine whether there is sufficient employee interest to warrant processing a representation petition. (See, e.g., *S. H. Kress & Co.* (1962) 127 NLRB 1244.) As the showing of interest is a matter for administrative determination, it is not litigable by the parties and is presumed to be valid in the absence of objective considerations questioning its authority. (NLRB Casehandling Manual sec. 11027.1; *Barnes Hospital* (1992) 306 NLRB 201, fn.2.)[5]

ALRB regulation section 20300(j) requires that any party which contends that the showing of interest was obtained by, inter alia, "employer assistance," in procuring the showing of interest must submit supporting evidence to the regional director within 72 hours of the filing of the petition. The challenge must be timely asserted in relation to the complaining party having acquired knowledge of the impropriety in order to facilitate an expedited investigation by the regional director prior to the time the election must be held. Early investigation may permit petitioners additional time to provide the requisite showing of interest (8 Cal Admin. Code sec. 20300 (j)(2).)

On March 3, 2003, the incumbent union filed an unfair labor practice charge in which it alleged that GVI had solicited, encouraged, promoted and/or provided assistance in the initiation, signing, and/or filing of a decertification petition since January, 2003. The petition for decertification was filed on March 5 which meant that the election would have to be held no later than March 13. Although professing knowledge of alleged employer assistance as early as January, well before the filing of the petition, there is no indication that the incumbent union availed itself of this regulatory procedure in order to permit the regional director sufficient time to consider the challenge prior to the election. Perhaps the charging party believed that it had a stronger case in asserting that the Employer had instigated the decertification effort, an allegation which the regional office investigation revealed was totally without foundation. Had the contention of tainted cards with supporting evidence been expressly referred to the regional director in accordance with the provisions of the relevant regulation, a collateral investigation of the

[5] It is worth noting that NLRB investigative hearing examiners are cautioned against permitting the showing to become an issue in representation proceedings because once the election has been held, it is the election and not the showing of interest which determines whether employees desire representation. *(NLRB Casehandling Manual sec. 11031.1; J. I Case* Co. (9th Cir. 1953) 201 F. 2d 597.)

matter might well have been accomplished and, if the charging party's assertion been found meritorious, this entire protracted proceeding may have been avoided.

In any event, constrained by the statutory mandate that all elections be held within seven days of the filing of a petition, the regional director proceeded to conduct the election within the statutory time frame and, under the Board's authority in *Cattle Valley Farms* (1982) 8 ALRB No. 24,[6] impounded the ballots in order to continue his investigation. Following the election and completion of the investigation, the regional director issued a complaint in which only the assistance portion of the charge survived. That complaint resulted in an evidentiary hearing, the result of which is currently pending before the Board.

Next, the Board asks:

> **Whether the NLRB's Overnite Transportation decision is applicable to ALRA cases regarding the showing of interest in a decertification election.**[7]

In view of the abstract context in which the question is posed, it is not clear whether the Board is asking only whether *Overnite* is applicable to decertification cases generally, and, if so, the short answer is that the Board is free to follow any NLRB precedent it deems applicable in the contest of agriculture and therefore may well find *Overnite* persuasive or even controlling were it to encounter a similar fact pattern. (Labor Code section 1148).

But if the Board is asking whether *Overnite* has application to the present case, that would indeed present remarkably different considerations. While the Board apparently believes *Overnite* may have relevance, the factual differences between that case and the case at bar are so startling as to bring into serious question the Board's mere recognition of *Overnite* in this particular setting.

Overnite may well represent the outer limits of conduct designed to defeat unionization; conduct which strikes at the heart of the Act and which was played out forcefully over a protracted period of time, accompanied by threats and promises of benefits designed to influence represented employees to disavow their union and to warn unrepresented employees that serious consequences would befall them should they choose to affiliate themselves with a bargaining agent for purposes of collective bargaining.

The *Overnite* employer threatened to close its operations and divest employees of their jobs or, alternatively, to create more onerous working conditions. It also threatened them with loss of benefits if they supported the union and promised to reward them if they rejected the union by, inter alia, resolving their grievances and providing enhanced terms and conditions of employment including an outright grant of benefits. Then, in order to

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[6] Although not a model of clarity in most respects, *Cattle Valley* does authorize a regional director to impound ballots in order to investigate late filed charges. (sl. op. at p. 14.)

[7] *Overnite Transportation Co.* (2001) 333 NLRB 166.

lend credence to its threats and promises, it actually granted benefits to employees in its unrepresented operations while withholding a wage increase from a represented facility. In a related case, *Overnite Transportation* (7th Cir. 1994) 938 F 2d 821), the employer engaged in surface bargaining despite having attended six bargaining sessions while at the same time in away from the table conduct its vice president declared that the Company would never sign a contract with the union, threatened to shut down a specific terminal in order to defeat the union, implied that the Employer would force a strike situation and then discharge any employee who joined a picket line.

Applying the factors set forth in *Master Slack Corp.*(1984) 271 NLRB No. 15 (see fn. 1, infra), the NLRB found a causal connection between the employer's pattern of serious and repeated violations of the Act and the employees' attempt to decertify their representative. Obviously the variance between the facts in *Overnite* and GVI is so extensive as to readily remove it as an applicable precedent. All that aside, and perhaps more significantly for our immediate purpose, the *Overnite* Board cautioned that,

> Not every unfair labor practice will...taint a decertification petition...Where a case involves unfair labor practices other than a general refusal to recognize and bargain, a **causal connection** must be shown between the unfair labor practices and the **subsequent** employee disaffection with an incumbent union...". (Emphasis added)[8]

In inviting written comment, the Board has cautioned that any discussion of the facts in Gallo Vineyards, Inc. (GVI) may be inappropriate because the Board already has a full record of the evidentiary hearing. The directive is somewhat anomalous as only precise facts should serve to dispose of concrete cases and it may be assumed that the Board is not seeking generalizations outside the case at hand with the notion of issuing, for example, only an advisory opinion - or regulations - applicable to cases in general. Since it is a given that the Board decides cases on a case-by-case basis upon consideration of all the relevant facts in the particular case, this exercise can be useful only in relation to GVI. And, in all candor, no discussion of certain of the questions posed by the Board have meaning absent reference to the findings of fact and conclusions of law rendered by the Administrative Law Judge (ALJ) whose recommended decision is currently pending review by the Board. That decision is a public document available to anyone desirous of obtaining a copy. Moreover, the very nature of certain questions, this being one of them, have in and of themselves served effectively to reopen the record or to suggest that the existing record may not be adequate.

Like the proverbial which came first question, the chicken or the egg, it is clear that *Overnite* stands for the proposition that the unfair labor practice(s) must occur first in time in order to be the cause of employee disaffection. General Counsel neither alleged nor established that GVI initiated the decertification effort, there are no other unfair labor practices in issue, and the petition was timely filed during the open window period when

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[8] The notion of a causal connection in these circumstances is neither novel nor new (See e.g. *Williams Enterprises* (1995) 312 NLRB 937, *enforced* (4th Cir 1995) 50 F3d 1280).

the parties were in the third year of their collective bargaining agreement. So unless there is record evidence establishing that the assistance of two supervisors in soliciting support for the petition was the cause of employee disaffection, *Overnite* has no meaning.[9]

Still the Board persists in assigning that case some significance. Perhaps the most telling indicator of the Board's interest is less *Overnite* itself and more a case cited with approval by the *Overnite* Board - *Master Slacks Corp.* 271 NLRB (see fn. 1 infra) which proposes factors the NLRB may employ when determining whether there is a cause and effect relationship between the unfair labor practice and the subsequent expression of employee disaffection with their incumbent representative. Were the Board predisposed to following the *Master Slacks* criteria as general policy under the ALRA, it could not apply them to the case at hand because the variance in facts identified in *Master Slacks* and those which obtain in GVI are so extensive as to render M*aster Slacks* irrelevant. Of course the Board is free to utilize GVI as a vehicle in which to declare the *Master Slacks* criteria the general rule, but it may do so only for future cases lest it risk engaging in impermissible adjudicatory rule making. (*Excelsior Underwear* (1966) 156 NLRB 1236; *Wyman-Gordon Co. v. NLRB* (1969) 394 U.S. 759.)

Lastly, the Board asks:

> **Are NLRB [National Labor Relations Board] cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?**

I start from the premise that there is no other principle more free from doubt in the field of labor/management relations in California agriculture than the clearly expressed legislative preference for a representation scheme free of the cumbersome and complex RM/withdrawal of recognition doctrines available to employers under the national act.[10]

The NLRA does not require official Board certification as a condition precedent to establishing an employer's obligation to bargain. Section 9(a) simply provides that "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit...shall be the exclusive representatives...for the purpose of collective bargaining...". Because the national act is silent as to the manner in which representatives are chosen, the NLRB, unrestricted by express statutory limitations, has been free to develop methods for choosing such representatives and holds that an employer has a duty to bargain whenever the union presents "convincing evidence of majority support." (*NLRB v. Gissell Packing Co.* (1969) 395 U.S. 575.)

Thus, a union can force an employer to recognize it by submitting authorization cards signed by a majority of unit employees designating the union as their exclusive

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[9] The Board is not precluded from reopening the hearing with directions to the ALJ to take evidence on that question.

[10] A forceful example of the complicated procedures and questions necessary in such cases is the decision of the U.S. Supreme Court in *Allentown Mack Sales & Service* (1998) 118 S. Ct. 818.

representative for purposes of collective bargaining. There is a presumption in favor of cards which purport to demonstrate majority support absent an employer questioning their validity by means of "objective considerations" sufficient to persuade a regional director that an election is warranted in order to test the union's claim (one use of the employer's RM petition). Once representative status has been established, by whatever means, the duty to bargain may be extinguished at any time by an employer refusing to bargain and successfully defending its action on the basis of a good faith belief that the incumbent union no longer enjoys the support of a majority of its employees or by the presentation of "objective considerations" calling for an election to test its belief (again the RM petition).[11] Unions may also engage in picketing to force recognition, an unlawful practice under the ALRA. (*Julius Goldman's Egg City* (1980) 5 ALRB No. 8.)

While, as noted previously, the NLRA does not dictate the process by which exclusive representatives are selected, the ALRA clearly specifies a single method for their selection. Labor Code section 1156 provides that "[r]epresentatives designated or selected by a secret ballot for the purpose of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives...". Section 1156.3 specifies the procedures for such elections and ALRB certifications conferring bargaining obligations.

When construing constitutional and statutory provisions, "the intent of the enacting body is the paramount consideration." (*In re Lance W* (1985) 37 Cal. 3d 873, 889.) Unlike Congress whose intent usually is readily discernible, legislative intent in California often is more elusive, except for that surrounding enactment of the ALRA. There is no dispute as to the intent of the California Legislature in enacting the limited means by which bargaining representatives for farm workers in this State are to be selected or removed. To wit: "[u]nder our Act, we only allow one way of recognition and that's through a secret ballot [election] in all cases." (Testimony of then Secretary of Agriculture and Services Bird in Hearing before Senate Industrial Relations Committee, May 21, 1975, p. 51); "There is a secret ballot [election] in all cases." (Comments of ALRA co-author Senator John Dunlap, id @59); "Above all else, [the ALRA] requires secret ballot elections in every instance." Comments of ALRA co-author Assemblyman Berman, Hearing before Assembly Committee On Labor Relations, May 12, 1975, p. 2.)

The Legislature did not adopt a somewhat modified version of the NLRA in a vacuum. Since enactment of the Taft-Hartley amendments of 1957, the NLRB and the courts have issued numerous decisions interpreting, applying, and often expanding the national act. But those rulings could not of course appear in the NLRA itself. In 1975, our Legislature was acutely aware of case law amendments adopted since 1957 and chose selectively to incorporate certain of them in the California statute. For example, the NLRA is silent as to the NLRB's post-1957 extension of certification principle and contract bar rule, but

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[11] The NLRB recently overturned 50 years of precedent by announcing that it will no longer permit an employer to rely on a good faith belief that the union's once-majority support has fallen below 50 percent in favor of a stricter standard. The Board held, "[w]e shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has in fact lost majority support". (*Levitz Furniture Company of the Pacific* (2002) 333 NLRB No. 105.)

both have been codified in the ALRA, respectively sections 1155.2(b) and 1156.7(b). The Legislature clearly did not sanction employer petitions to challenge and/or to test majority status or withdrawal of recognition by refusing to bargain although it clearly was aware of those practices under the national act. Their exclusion from the California statute was not accidental.

So while it is closely modeled after its national counterpart overall, the ALRA is distinguishable in several respects, but none more compelling than the provision that all bargaining representatives must have been selected by employees themselves in secret ballot elections and that only certification by the Board can trigger an employer's duty to bargain. The premise that supports this truism is equally applicable to canceling the bargaining obligation as once certified, a bargaining agent retains representative status until such time as employees file a decertification petition which results in an election whose results are certified by the Board.

So clear is the legislative policy in this regard that it is an unfair labor practice for an employer to recognize, negotiate with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the Act. (Labor Code section 1153(f).) *And, there is no parallel provision in the NLRA.*

When California created the ALRA nearly 30 years ago, it could have but clearly chose not to endorse concepts which would allow employers to challenge a claim for representation where there is no currently recognized or certified representative or to seek to demonstrate that the union has lost the support of a majority of employees since recognition or certification in order to extinguish its bargaining obligation. Furthermore, as the Board acknowledged so clearly in *Ventura County Agricultural Association* (1984) 10 ALRB No. 45 an employer's withdrawal of recognition on the grounds that a majority of its employees no longer supported the incumbent union is not cognizable under the Act.

Simarily, in *F&P Growers Association v. Agricultural Labor Relations Board* (168 Cal. App. 3d 667), the issue before the court, in the court's own words was "whether the NLRB precedent concerning the employer's good faith belief is applicable, such that under section 1148 of the ALRA, the agricultural petitioner herein may assert its good faith belief as a defense for failure to bargain." The court concluded as follows:

> NLRA precedent is inapplicable here because of California's legislative purpose and because of the differences in the two acts. While it does not follow inexorably that the agricultural employer's good faith belief is not a defense to refusal to bargain just because the Legislature prevented an agricultural employer from electing a union or from filing a decertification petition, nor is such a conclusion demanded by pure syllogistic reasoning, it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit

> an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly.

Given the recorded history attending passage of the Act, and the vast body of precedents which are directly on point, it is indeed curious that this particular Board chooses at this time to examine a matter which has long been settled, first by the Act itself, then by the Board which construes the Act, and ultimately by its reviewing courts. Prior Boards have addressed the same or similar questions and resolved them on the basis of loyalty to the statutory standards in light of the unique aspects of the agricultural work place setting which sets this Act apart from the NLRA, particularly in the areas of representation and bargaining. And they did so by wisely eschewing the NLRB's RM/withdrawal of recognition line of decisions because when seeking guidance from other cases the first rule is to establish factual similarity in order to preserve context.[12] Failure to recognize and honor this basic principle of sound decision making does not make for good law. Between the two labor boards are almost 100 years of decisions based on sound policy considerations *independent* of the RM/withdrawal of recognition doctrines.

I recognize that an agency may change its interpretation of a statute entrusted to its administration when necessary to reach a reasonable accommodation of conflicting policies or when the intent of the legislature is unclear. (See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* (1984) 204 S. Ct. 2778.) But when the intent and purpose of the legislature is clear, the agency must give it effect regardless of the agency's opinion. Legislative intent on this particular issue is altogether clear in expressing a preference for a representation scheme which is different from that endorsed by Congress. Consequently, mere willingness to consider RM petitions and withdrawals of recognition as developed under the national act and, of necessity, their complex

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[12] Notably, in this regard, the ALJ in GVI (ALJD 52) relies on an NLRB case whose facts are so dramatically dissimilar as to call into serious question its applicability, even in the remotest sense. In *Ron Tirapelli Ford, Inc. v. NLRB* (7th Cir. 1993) 987 F.2d 433, the employer advised the incumbent union that it was in receipt of a decertification petition submitted directly to him by his employees and therefore he would withdraw recognition and then, in reliance on the alleged showing of disaffection from the union, filed an RM petition with the NLRB. The Board found that the employer had actually forced initiation of the decertification effort by, inter alia, promising employees improved benefits if they would endorse a decertification petition, coupled with threats of discharge if they did not, and engaged in unlawful unilateral changes to enforce its demand that employees reject the union. This case involves repeated and egregious unfair labor practices which were deemed to be the cause of what essentially was a fabricated employee discontent engineered by the employer. Under those circumstances, a court would of course affirm the NLRB's findings that, as quoted by the ALJ in GVI, "[t]he tainted petition is a nullity; the resulting election is a nullity." So, again, like *Overnite, supra*, the disparity in the *Tirapelli* facts and the ones before the Board in GVI is so broad as to suggest that mere reference to it is misleading if not dishonest.

underlying principles and procedures,[13] demonstrates in my view a reckless disregard for the basic underpinnings of the ALRA. The distinctions between the two labor statutes as they concern the selection and retention of an exclusive representative cannot be rationalized away.

Respectfully submitted,

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[13] We need not tarry here to elaborate in detail on the laborious procedures which attend the processing and litigating of matters which arise under the NLRB in the context of RM and withdrawal of recognition issues except to this limited extent. *Caterair International* (1996) 322 NLRB 64, and related cases (*accord*, *Lee Lumber & Building Materials Corp.* (1996) 322 NLRB 175, *remanded* (D.C.Cir. 1997) 117 F.2d 1454, *on remand* (2001) 334 NLRB 399), stand for the proposition that where an employer subject to the jurisdiction of the national act has unlawfully refused to bargain (or has withdrawn recognition), any subsequent disaffection with the union will be presumed to be the result of the employer's conduct. Even where it is apparent the union has lost majority support, the NLRB will order a resumption of bargaining for a reasonable time, presumably a long enough period of time to erase any lingering effect caused by the employers conduct. The practical effect of the bargaining order under these circumstances is that it serves as an election bar by "blocking" any attempt by employees to remove their bargaining agent before they are able to do so in a free and uncoerced manner. But after the employer has bargained for what the NLRB deems a reasonable time, or long enough to permit dissipation of the effects of its conduct, it is free to again seek to demonstrate a loss of majority in order to withdraw recognition with virtual impunity. The NLRB's most recent decision in *Lee Lumber* (2001) 334 NLRB 399 is an excruciating and complex analysis outlining considerations which the NLRB ostensibly will find useful in determining such matters as how long is a reasonable time and what factors should serve to inform such an assessment. It should be readily apparent that the process outlined above is inconsistent with a legislative policy which created an expedited election process in which the employer is not a player.